U.S. Department of Labor **Office of Administrative Law Judges**
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Issue date: 07Dec2001

In the Matter of	:	
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FABIAN ANTONIO	:	Case Nos.: 2000-LHC-00213
Claimant	:	00214
	:	00215
v.	:	
	:	OWCP No.: 18-65981
NATIONAL STEEL	:	67835
AND SHIPBUILDING COMPANY	:	66253
Employer	:	
	:	

Jeffrey M. Winter, Esq.
San Diego, CA
For the Claimant

Maryann C. Shirvell, Esq.
San Diego, CA
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER[1]

This is a claim for compensation for permanent partial and permanent total disability arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter "the Act"). A formal hearing was held in San Diego, California, on December 13, 2000. At the hearing the parties agreed to the following stipulations: the claim is covered by the Act; there was an employer-employee relationship at the time of the injuries; that Claimant's average weekly wage at the time of the first injury was $558.59, with a corresponding compensation rate of $372.39; that Claimant

[1] The following abbreviations will be used when citing to the record in this case: EX–Employer's Exhibit; CX–Claimant's Exhibit; and TR–Hearing Transcript.

is unable to return to his usual work as a shipfitter due to his industrial back injury; and that Claimant was temporarily totally disabled from July 14, 1997 to July 15, 1997,[2] and from April 7, 1998 to January 13, 1999.

Claimant contends that he is entitled to compensation for permanent total disability as a combined result of his back, knee and psychological injuries. Employer maintains that, although Claimant has permanent disabilities as a result of his industrial injuries, it has demonstrated that he is capable of earning $400 per week working full time.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

1. History of Present Injuries

At the time of the hearing, Claimant was 42 years old, married and had four children. He was born in El Salvador, immigrated to the United States in 1989, and became a U.S. citizen in 1999 (EX J, at 269). Before coming to the United States, he had completed two years of university education in El Salvador and received a certificate as an accountant (EX J, at 271). He also attended several classes in the United States, including steel fabrication and electronic assembly (TR 70-72; EX J, at 272). Additionally, he completed his GED in 1992 and has taken several English classes, although he had not completed any at the time of the hearing (TR 72-75; EX J, at 273; EX Y). Claimant has also performed a variety of jobs both in El Salvador and the United States. In El Salvador, he worked as a bookkeeper and a delivery man (TR 70; EX J, at 271). After immigrating to the United States, he worked in construction for about two years (EX J, at 270). He gained employment with Respondent in August 1994 and was working as a shipfitter at the time of his first injury (TR 82).

Claimant suffered two injuries causing permanent impairment while in the employ of Respondent.[3] On July 11, 1997, Claimant grabbed a ladder to keep it from falling, and instantly felt pain in his lower back (EX J, at 304). He continued working that day and did not report the accident.

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[2] The parties stipulated at the hearing, and Employer states in its post-hearing brief, that Claimant was temporarily totally disabled from *June* 14, 1997 through July 15, 1997. However, based on other evidence in the case, including Claimant's recitation of the stipulations in his post-hearing brief, it is clear that the parties intended to stipulate that Claimant was temporarily totally disabled from *July* 14 through July 15, 1997.

[3] Claimant also suffered an injury to his right ankle on July 30, 1997 which resulted in no permanent impairment. However, the record contains evidence of this injury because he was treated for it during the time period relevant to this claim.

He sought medical treatment several days after the injury because he was still experiencing pain in his low back and legs (EX J, at 305). Claimant was off work on July 14 and 15, 1997, and returned at light duty thereafter (EX J, at 305).

Soon after his back injury, Claimant came under the medical treatment of Dr. McSweeney, who diagnosed a lumbar strain and industrial aggravation of a pre-existing spondylolisthesis and pursued conservative treatment (CX 11, at 155-58). An MRI was performed on November 4, 1997, which revealed a disc bulge at L3-4 with mild nerve root compression, a moderate disc bulge at L4-5, and moderate to severe left-sided foraminal stenosis[4] at L5-S1 caused by "lateral bulging of disc material" with nerve root compression (EX 8, at 124).

At the suggestion of his counsel, Claimant began treatment with Dr. Sidney Levine in late November 1997. Dr. Levine reported that Claimant complained of constant low back pain extending into his right buttock and posterior thigh, but experienced no numbness in his lower extremities (CX 3, at 13). Dr. Levine diagnosed Claimant with Grade I spondylolisthesis[5] at L5-S1, and L3-4, L4-5 and L5-S1 "disc disease with disc herniations and nerve root compressions" (CX 3, at 17). Dr. Levine recommended that Claimant undergo surgery, but noted that Claimant was resistant to the suggestion. He also suggested physical therapy, which Claimant underwent but later stated was of no benefit (CX 3, at 17).

Claimant was also examined by Dr. Larry Dodge, an orthopedic surgeon, on December 4, 1997 at Employer's request. Dr. Dodge also reported that Claimant had low back and right thigh pain, and further noted that Claimant had no left leg pain (EX B, at 8). Dr. Dodge testified that Claimant was generally cooperative, but refused to heel and toe walk and complained of pain in his back even when the doctor touched him very lightly (TR 158; EX B, at 9). Dr. Dodge indicated that Claimant's refusal to walk on his heels or toes was curious given that he had a normal neurological examination, and stated that Claimant's reaction to light touch indicated that Claimant had a low pain threshold (TR 159). Dr. Dodge diagnosed Claimant with a lumbosacral sprain and degenerative disc disease at L3-4, L4-5, and L5-S1, "with some associated nerve root compression" (EX B, at 9). He disagreed with Dr. Levine's recommendation of surgery, however, because Claimant's subjective complaints of pain radiating into his right buttock and thigh did not correspond with the MRI evidence of left-sided nerve root compression (TR 160-61). Finally, he stated that Claimant had not reached maximum medical improvement, but could perform light work with no repetitive bending and with lifting limited to 25 pounds.

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[4] The narrowing or stricture of a duct or canal. *Dorland's Illustrated Medical Dictionary* 1576 (28th ed. 1994).

[5] The "forward displacement (olisthy) of one vertebra over another . . . ." *Dorland's Illustrated Medical Dictionary* 1563 (28th ed. 1994).

Claimant's back pain continued through the winter of 1998. He visited Dr. Dodge again on February 12, 1998, at which point Dr. Dodge reported that Claimant complained of tightness and pain in his left thigh (EX B, at 13). Based on his examination and further radiographic evidence, Dr. Dodge diagnosed Claimant with spondylolisthesis at L5-S1, which he explained as a congenital slippage of the vertebrae that pre-dated Claimant's July 1997 injury (EX B, at 15; TR 163-64). Claimant also continued in the care of Dr. Levine throughout this time. Dr. Levine continued to recommend surgery as Claimant's pain failed to abate. Claimant's opinion regarding surgery vacillated throughout the winter, but ultimately he did not undergo the procedure (CX 3, at 26, 29).

April 6, 1998, almost a year after his back injury, Claimant was still working at light duty when he fell while ascending a staircase, injuring both of his knees. Claimant reported the injury and was placed on temporary total disability on April 7 (CX 3, at 33). His right knee pain resolved, but his left knee continued to hurt constantly, and he sought treatment with Dr. Levine. Dr. Levine diagnosed him with a contusion and "posttraumatic effusion and internal derangement" (CX 3, at 37). Claimant then underwent an MRI of his left knee, which revealed a "large bucket handle tear of the medial meniscus"[6] (CX 7, at 122). Dr. Levine decided that surgery was appropriate and performed the procedure on May 13, 1998 (CX 3, at 45). Dr. Levine reported that Claimant recovered well from the surgery, and advised Claimant that he could return to modified work soon after the surgery, but Claimant chose not to do so (CX 3, at 46). Claimant was not pleased with the results of the surgery, and felt that he could not climb stairs and therefore could not work (CX 3, at 46). He also decided that he would not undergo back surgery based on his perceived failure of the knee surgery.

Dr. Levine determined that Claimant had reached maximum medical improvement ("MMI") regarding his back injury on June 30, 1998 (CX 3, at 39). He reported that Claimant continued to complain of constant low back pain, and limited him to light work, although his report did not elaborate on what light work entailed (CX 3, at 42). Dr. Levine's testimony regarding Claimant's restrictions was also ambiguous. In his first deposition in November 2000, the doctor stated that Claimant should not lift over 25 pounds; should not engage in repetitive stooping, pushing, or pulling; and should only sit or stand for 30 minutes at a time with the opportunity to change position every 10 or 15 minutes (EX R, at 443). When questioned further, however, he stated that Claimant should have the opportunity to change position every 30 minutes. In his April 2001 deposition, Dr. Levine articulated slightly different limitations, stating that he would not allow Claimant to lift over 15 pounds (CX 18, at 200). He also added that Claimant should not twist his body repeatedly, and should not repeatedly squat, kneel, crawl or climb (CX 18, at 200-01). Dr. Levine stated that he had reviewed Claimant's deposition and hearing testimony, but could not recall it. When informed that Claimant had testified at both his deposition and the hearing that he could sit for up to two hours, Dr. Levine abandoned his sitting

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[6] The medial meniscus is "a crescent shaped disk of fibrocartilage attached to the medial margin of the superior articular surface of the tibia." *Dorland's Illustrated Medical Dictionary* 1013 (28th ed. 1994).

restriction, stating "he knows what he is capable of doing" (CX 18, at 203).

At the end of the summer of 1998, Dr. Dodge again examined Claimant, and concurred that he had reached maximum medical improvement with regard to his back injury. Dr. Dodge accepted Dr. Levine's MMI date and stated that Claimant could not return to his usual work. However, he only precluded Claimant from performing very heavy work, avoiding repetitive bending, stooping, lifting, pushing, pulling or climbing (EX B, at 23; TR 167). At the hearing, he stated that Claimant could not lift over 50 pounds, and should not lift over 30 pounds on a continuous basis (TR 169). He also approved all of the jobs on Employer's labor market survey, although he only conditionally approved the jobs of warehouse worker and janitor (EX B, at 33) (see discussion, *infra*).

On January 14, 1999, Dr. Levine determined that Claimant had also reached MMI with regard to his left knee injury. He noted that Claimant had begun using a cane because he sensed instability in his knee, but informed Claimant that he did not need to use the cane (CX 3, at 64, 68). Dr. Levine stated that Claimant had a 15% impairment to his left knee (CX 3, at 67). This rating included a 10% impairment to the lower extremity due to "partial medial and lateral mensicectomies" and a 5% impairment of the lower extremity due to direct trauma to both knees and "chondromalacia of the patella," which is the progressive erosion of cartilage, and "patellofemoral pain and crepitus," which is a cracking feeling or sound in the joint (CX 3, at 67; CX 18, at 198). *Dorland's Illustrated Medical Dictionary* 321, 391 (28th ed. 1994). At his April 2001 deposition, Dr. Levine explained that the additional 5% rating was due to crepitation on physical examination, direct trauma, and Claimant's complaints of pain (CX 18, at 198).

Dr. Dodge agreed with Dr. Levine's date of MMI for Claimant's knee injury. However, he assigned Claimant only a 10% impairment rating for the left knee injury. Dr. Dodge stated that Claimant complained of only slight to moderate pain in the left knee, and that Claimant's subjective complaints exceeded the objective findings (EX B, at 29). He clarified that he did not believe Claimant was malingering, but that Claimant had an abnormally low pain threshold (TR 178). He asserted that, objectively, Claimant had a meniscal tear noted at the time of his knee surgery, and based his 10% rating on this objective finding (TR 170; EX B, at 29). In assigning this rating, Dr. Dodge noted that Claimant had no evidence of atrophy of his left leg, his ligaments were stable, his neurological exam was normal, and he had no arthritic changes in his knee (TR 170-71). He stated that he believed Dr. Levine miscalculated Claimant's impairment because he gave Claimant a rating based on an arthritic condition, or a softening of the cartilage, which Claimant did not have (TR 171-72). Further, Claimant had no x-ray evidence of joint-space narrowing of his patella thermal joint (TR 174). Finally, Dr. Dodge pointed out that the AMA guidelines do not provide for increased impairment rating because there was direct trauma to both knees, which was one of Dr. Levine's reasons for his additional 5% impairment rating (TR 174). Dr. Dodge stated that Claimant should avoid repetitive squatting and kneeling because of his knee injury, and that Claimant would be able to perform all of the jobs on Employer's labor market survey (TR 174-75) (see discussion, *infra*).

In addition to his two physical injuries causing permanent impairment, Claimant experienced increasing psychological difficulties as his physical treatment progressed. Dr. Levine referred him to Dr. Fernando Bayardo for psychiatric treatment, which Claimant began in the fall of 1998. Dr. Bayardo testified at the hearing regarding Claimant's psychiatric condition. He diagnosed Claimant with major depression with psychotic features, and testified that Claimant's psychiatric injury precluded him from working full time or performing a variety of jobs (TR 17, 28-33; EX V, at 511). He asserted that Claimant had become progressively depressed as a result of his industrial injuries (CX 4, at 77). Further, as his treatment of Claimant progressed, psychotic tendencies in Claimant's personality began to emerge. He stated that Claimant had become increasingly paranoid, fearing that his phone was being tapped and that other students in his English class were spies (CX 4, at 84). Dr. Bayardo prescribed anti-psychotic medication to Claimant, but Claimant unilaterally discontinued his medication on several occasions (CX 4, at 82, 94). Dr. Bayardo testified that Claimant's fear of taking medication was linked to his paranoid personality, but that when Claimant failed to take his medication he became increasingly mistrustful, angry, and superstitious (TR 30). He also noted that Claimant continued to use a cane despite his physician's instructions to discontinue the use, stating that Claimant appeared to have a psychological need for the cane.

Dr. Bayardo determined that Claimant had reached maximum medical improvement with regard to his psychiatric injury on June 19, 1999 (TR 19). He believed that Claimant's psychiatric impairment hindered his ability to work, stating that his paranoia would prevent him from trusting co-workers and supervisors and working effectively with them (TR 26). Dr. Bayardo stated that Claimant might have difficulty performing the job of screen printer, and testified that working as a security guard would increase his paranoid thinking (TR 28). He further stated that Claimant was unable to work or attend vocational rehabilitation more than three days a week, three to four hours per day, because his depression made him unable to concentrate (TR 31). In addition, he stated that Claimant would present poorly for a job interview because he was unable to maintain eye contact, swung his head from side to side, and shifted his position often (TR 31-32). Dr. Bayardo acknowledged that Claimant's paranoid personality traits existed before his industrial injury, and that his industrial injury was compounded by his pre-existing personality traits (TR 35). He further recognized that Claimant had successfully kept his paranoid traits in control in his past jobs, and acknowledged that Claimant was capable of comprehending and following instructions (TR 41, 43).

At Employer's request, Claimant was also examined by Dr. Robert Zink, a psychologist who interviewed Claimant and performed psychological tests on two occasions. Like Dr. Bayardo, Dr. Zink diagnosed Claimant with major depression resulting from his industrial injuries, and clarified that Claimant had personality traits predisposing him to depression (EX F, at 72-73; EX W, at 516-17, 520). He also concurred with Dr. Bayardo's date of maximum medical improvement. Unlike Dr. Bayardo, however, Dr. Zink believed that Claimant had passive-aggressive and avoidance personality traits, but not disorders (EX W, at 519). He pointed out that Claimant had no history revealing an

inability to contain his aggressive impulses or become paralyzed by his paranoia (EX W, at 522). Further, Claimant's aggressive tendencies manifested themselves only in his behavior toward his family, indicating that Claimant was in control of his behavior and allowing himself to act out in an atmosphere where he felt it was safe to do so (EX W, at 522-23). He also noted that Claimant presented himself well in his interview with him and had no apparent problems completing the psychological tests administered (EX W, at 521). Dr. Zink stated that Claimant's psychiatric impairment rendered him generally less employable than he would be absent the impairment, but did not preclude him from working full time or performing any of the jobs on Employer's labor market survey (EX W, at 520-21). (see discussion, *infra*).

Both Dr. Bayardo and Dr. Zink acknowledged that their assessments of Claimant were very similar, with only a few differences of note. Dr. Bayardo originally assigned Claimant a lower impairment rating with regard to his ability to carry out responsibility for direction, control, and planning, but stated at the hearing that Dr. Zink's higher rating was more accurate than his own. Further, Dr. Bayardo originally assigned Claimant a higher impairment rating for performing simple and repetitive tasks, but at deposition stated that he agreed with Dr. Zink's minimal impairment rating (TR 43-44; EX V, at 508). Dr. Zink pointed out that his and Dr. Bayardo's impairment ratings differed most significantly with regard to Claimant's impairment level in relating to other people beyond giving and receiving instructions (CX 15, at 173; CX 4, at 102). Dr. Zink explained that Dr. Bayardo's rating of "moderate" indicated that Claimant had lost about half of his ability to relate to people, but that Claimant's Millon test indicated that Claimant only had a slight impairment in this area (CX 15, at 173). At his deposition, Dr. Bayardo reaffirmed his moderate impairment rating regarding Claimant's ability to relate to other people, stating that Claimant had a paranoid personality disorder that at times degenerated to a borderline psychotic disorder (EX V, at 509). As an example, Dr. Bayardo pointed out that Claimant believed that eight people in his ESL class were spies (EX V, at 509).

Although they reached many of the same conclusions, the doctors' methodologies differed significantly. Dr. Bayardo interviewed Claimant and based his opinion on his observations of Claimant in his regularly occurring sessions with the doctor. Dr. Zink also interviewed Claimant, but only saw Claimant twice, and based his opinion on both his interview and a series of tests administered to Claimant. Both doctors stated that the most important component in forming a diagnosis was the interview and history of the patient (EX W, at 525). Further, Dr. Bayardo protested that diagnostic tests were not particularly reliable in this case because the tests were developed based on an American, English speaking population, and the responses for a non-English speaking individual of a different culture may not hold the same meaning that they would if given by a person of a culture on which the tests were based (TR 22). Dr. Zink also readily acknowledged this difficulty (CX 13, at 166), but stated that the tests were administered in Spanish and all precautions were taken to assure the accuracy of the results (EX W, at 516).

Based on Claimant's physical and psychological impairments, Employer had Joyce Gill, a

vocational rehabilitation specialist, prepare labor market surveys based on Claimant's skills and physical abilities. Ms. Gill testified at the hearing regarding her conversation with Claimant and her surveys. Through her testimony, some possible inconsistencies in Claimant's presentations emerged. First, Claimant asserted that his English speaking abilities were very limited, but Ms. Gill stated that she conducted most of her conversation with him in English without difficulty (TR 114). Additionally, Claimant denied taking an English class in 1993, but had presented Ms. Gill with the certificate of progress from this class (EX Y). Ms. Gill performed labor market surveys dated August 17, 1999 and June 23, 2000 (EX H). She stated that, based on the doctors' restrictions, Claimant was able to obtain work as a security guard, small products assembler, courier, janitor, screen printer or pest control technician.

Ms. Gill's August 1999 labor market survey identified security guard, small products assembly and screen printer jobs. She explained that security guard positions ranged in the degree of responsibility and physical requirements, and that she believed Claimant was capable of jobs that required only walking or sitting to identify individuals entering a building, and that did not require carrying a weapon or using physical force (TR 116-17). The job is classified as light work in the *Dictionary of Occupational Titles* ("DOT"). The jobs on Ms. Gill's August 1999 survey required very little physical exertion (EX H, at 157-58). The job descriptions appeared to require little more than a physical presence on the job, but Dr. Bayardo testified that he would not advise that Claimant obtain a position as a security guard because of his paranoid personality (TR 28). Dr. Zink believed Claimant would be capable of performing the work of a security guard, however.

The position of small products assembler is also classified as light work in the DOT (EX H, at 150). The jobs on Ms. Gill's August 1999 labor market survey required occasional lifting up to 20 pounds and little interaction with other people beyond "giving and receiving instructions" (EX H, at 151-54). Similarly, the screen printer jobs all limited lifting to 20 pounds and required little interaction with other persons (EX H, at 153-54). One job offered screen printing training (EX H, at 153). Claimant protested that these jobs were beyond his physical capacity and would cause him mental stress. Dr. Bayardo stated that Claimant could perform the job of small products assembly, but hypothesized that Claimant could become "overly anxious" working as a screen printer (TR 28). Dr. Bayardo also premised his opinion that Claimant could not perform the work of a screen printer on Claimant's physical impairments. Dr. Bayardo's opinion regarding Claimant's physical restrictionsis entitled to less weight than the opinions of the doctors with more relevant specialties.

Ms. Gill performed an additional labor market survey in late June 2000 (EX H, at 159). This survey identified the jobs of pest control technician, warehouse worker, janitor and courier, as well as additional security guard, small products assembly and screen printer positions (EX H, at 169). The pest control technician jobs required lifting 20-35 pounds and also required some crawling (EX H, at 175-88). Dr. Levine stated that this job was beyond Claimant's physical capacity (CX 18, at 200-01) The job of warehouse worker is classified as medium work in the DOT (EX H, at189), and the specific

jobs presented required lifting up to 50 or even 75 pounds (EX H, at 191, 198), but did not require repetitive squatting or kneeling (EX H, at 191-198). The position of janitor is also classified as medium duty work in the DOT (EX H, at199). Some of the specific jobs listed required lifting up to 50 pounds (EX H, at 202-09), although others only required lifting up to 25 pounds (EX H, at 202-09). The job of courier is classified as light duty in the DOT (EX H, at 210), although some of the jobs presented required lifting up to 50 pounds (EX H, at 212, 213, 217, 218). These lifting requirements exceed Dr. Levine's restrictions, but are within Dr. Dodge's restrictions if done infrequently. Dr. Bayardo approved the job as within Claimant's psychological abilities (TR 29). The courier positions also required that the employee have a valid driver's license, which Claimant has (TR 84).

Despite Employer's contention that he can work full time, Claimant testified that he still has frequent pain which he attributes to his industrial injuries, and which impacts his ability to work and attend school. He stated that he experiences pain in his lower back and has constant pain in his left knee, as well as occasional pain in his right knee and ankle (TR 84-85). He stated that he could sit for an hour to two hours without pain and could stand for one to two hours (TR 85; EX J, at 263). He testified that, on an average day, he watched TV, went to school, played Nintendo with his two children, cooked and played his guitar (TR 86). He further testified that he has started five English as a second language classes since 1998, but has not finished any of them (TR 75). At the time of the hearing, he was enrolled in an ESL class that met five days a week, three hours a day, but he only attended class three or four days a week (TR 76). He testified in deposition that he was often unable to attend his English class because of pain in his low back (EX J, at 316). He also reported to Dr. Bayardo that he did not attend his English class because he could not climb the stairs to get to the classroom, and because he feared that some of the students in the class were spies (CX 16, at 185). Employer pointed out that Claimant successfully completed a class to attain his citizenship in 1999, but Claimant noted that the citizenship class had a longer break and met only five times over two weeks (TR 73-76). At the time of the hearing, Claimant was taking Risperdal, an antipsychotic medication prescribed by Dr. Bayardo (CX 4, at 82), and Daypro prescribed by Dr. Levine for pain (TR 87-88). Claimant testified that he cannot sleep and his hands shake if he does not take the Risperdal, and that his pain increases if he discontinues the Daypro (TR 89).

2. Non Work-Related Injuries

In addition to his several industrial industries, Claimant was involved in two car accidents. The first occurred on May 15, 1997, two months before his back injury. At the hearing, he testified that he hurt his neck in this accident, but not his back (TR 77-78), and at deposition he testified that he received treatment "[f]or the shoulders and for something like that," but not for his back (EX J, at 299). Claimant filed a lawsuit related to this accident, and the settlement conference brief arising out of the accident stated that Claimant "had complaints of pain and stiffness to his lower back" which was diagnosed as a lower back strain (EX X, at 2). There is no other evidence in the record that Claimant suffered a low back injury in this accident, however. In fact, medical records support Claimant's

testimony that he suffered an injury to his upper back (EX Q, at 420-21). One year later, on May 16, 1998, Claimant was involved in a second car accident (EX J, at 294; EX O, at 361). He stated that he received physical therapy and saw a chiropractor for pain in his neck as a result of this accident (EX J, at 295, 297). Claimant also filed a lawsuit as a result of this accident, and received a settlement (EX J, at 299-300).

Claimant did not inform Drs. Bayardo or Dodge of his car accidents. He testified that they did not ask him specifically if he had been involved in a car accident (EX J, at 297-98, 300). He told Dr. Levine about one of the accidents, but did not inform him that he was receiving chiropractic treatment (EX J, at 297). Dr. Levine's memory was poor regarding whether Claimant informed him of either accident, but he did not mention the accidents in his reports (EX R, at 441-42). He acknowledged that it would have been helpful to have been aware of the car accidents when diagnosing and treating Claimant (EX R, at 446). Dr. Bayardo testified that knowledge of the car accidents would have been relevant information for him to have when initially treating Claimant, but that the information would not have changed his opinion (TR 553-54). Dr. Dodge stated that Claimant denied any previous back injuries when he examined him, but that information regarding any car accidents would have been relevant to his examination (TR 191). He did not assert that Claimant's present impairment level was increased by his previous car accidents, however.

B. Discussion

1. Nature and Extent of Disability

Claimant contends that he is permanently, totally disabled as a result of his back injury, knee injury and psychological injuries. Employer acknowledges that Claimant has permanent impairments as a result of these injuries, but disputes that Claimant is unable to work. Rather, Employer contends that Claimant can work full time earning $400 per week.

A permanent disability is one that has continued for a lengthy period and appears to be of lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Constr. Co.*, 17 BRBS 56 (1985). The determination of whether an injury is temporary or permanent is not based on the date that a claimant returns to work, but is based on medical evidence establishing the date at which claimant has received the maximum benefit of medical treatment. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Trask*, 17 BRBS at 60. In the present case, the parties have no dispute regarding dates of MMI. Both parties' expert witnesses concur that Claimant's lower back injury reached MMI on June 30, 1998; his knee injury reached MMI on January 14, 1999; and his psychological injury reached MMI on June 19, 1999. I

find that Claimant reached MMI for his various injuries on these dates.

At a minimum, Claimant is entitled to an award for permanent partial disability in accordance with the schedule in §8 of the Act, as Employer concedes that Claimant's knee injury occurred within the scope of his employment. The parties only dispute the extent of disability, with Claimant asserting he has a 15% disability and Employer asserting he has a 10% disability. The extent of Claimant's impairment to his knee turns on the weight assigned to the opinions of Drs. Dodge and Levine. Dr. Levine, Claimant's treating physician, stated that 5% of his rating was due to direct trauma to both knees, a softening of the cartilage in Claimant's left knee, and grinding noise heard in Claimant's knee. Dr. Dodge pointed out that direct trauma to both knees was not grounds for assigning additional impairment, and asserted that Claimant had no arthritic process in his knee accounting for a softening of cartilage.

A treating physician's opinion may be entitled to some degree of deference; however, that is not the case here. Dr. Levine's opinion was poorly articulated in his depositions and reports. In deposition, he did little more than restate the bases for the impairment rating that he had already listed in his reports. When asked specific questions regarding Claimant's statements and symptoms, Dr. Levine repeatedly said that he simply did not recall Claimant's complaints, symptoms, history, and testimony. In fact, he did not recall if he even reviewed Claimant's testimony (CX 18, at 202). Furthermore, Claimant complained on several occasions that Dr. Levine did not see him, but instead relegated him to the care of his assistants, which may somewhat explain the doctor's lack of familiarity with his own patient (TR 97). Additionally, Dr. Levine altered the restrictions he assigned to Claimant for his back injury between one deposition and the next, and seemed more intent on stating that Claimant was unable to perform the jobs offered by Employer than in clearly setting forth Claimant's restrictions (CX 18, at 199-201). Dr. Dodge pointed out that Dr. Levine based his impairment rating on some improper criteria, and that Claimant showed no physical evidence of cartilage softening in his left knee which would account for Dr. Levine's additional 5% impairment rating. Since Dr. Levine failed to clearly explain his opinion, his impairment rating based on Claimant's knee injury is of little value.

In contrast, Dr. Dodge clearly articulated his medical opinion and the bases for it in both his reports and his testimony at the hearing. He explained that Claimant was entitled to a 10% impairment rating based on the tear of the medial and lateral meniscus observed in surgery (TR 170), and that Claimant was not entitled to a higher impairment rating because he had no evidence of arthritis in the knee or atrophy of the leg from disuse, and had a normal neurological examination and stable ligaments in his knee (TR 171). In addition, while Dr. Dodge testified on Employer's behalf, there is no evidence of bias in his medical opinion. He credited Claimant's subjective complaints of pain and, with regard to Claimant's back injury, stated that Claimant was permanently disabled and could not return to his usual work, neither of which are favorable to Employer's position. Even in the face of Claimant's extreme reaction to the slightest touch, Dr. Dodge stated that Claimant was not malingering, but instead had a very low pain threshold (TR 178). Further, he continued to credit Claimant's subjective complaints

after he discovered that Claimant had failed to inform him of two relevant non-work-related injuries suffered in car accidents, a fact that could legitimately cast doubt on Claimant's credibility. Thus, after reviewing Dr. Dodge's records and observing his hearing testimony, I find his opinion to be entitled to the most weight in this matter. Therefore, I accept his medical opinion that Claimant suffered a 10% permanent impairment to his lower left extremity as a result of his knee injury. At a minimum, Claimant is entitled to an award for 10% permanent impairment to his lower left extremity. However, because he also has permanent unscheduled injuries which he contends affect his ability to work, Claimant may be entitled to greater compensation based on a loss of wage earning capacity.

To make a prima facie case of total disability due to an unscheduled injury, Claimant must show that he cannot return to his regular and usual employment due to his work-related injury. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984). A claimant's usual employment is his job at the time he was injured. Both Drs. Levine and Dodge opined that Claimant cannot return to his former occupation due to his back injury. Therefore, I find that Claimant has established a prima facie case of total disability because his back injury precludes him from working as a shipfitter.

Once the claimant establishes a prima facie case of total disability, the burden shifts to the employer to establish suitable alternative employment. An employer must demonstrate the existence of realistically available job opportunities for the claimant within the area where he resides which he is capable of performing considering his age, education, work experience, and physical restrictions. *See American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976). Through the testimony of Joyce Gill, Employer presented evidence of jobs as a screen printer, small products assembler, security guard, janitor, warehouse worker, courier and pest control technician (EX H). Dr. Dodge stated that Claimant was precluded from performing very heavy work, limited him to lifting under 30 pounds continuously and 40-50 pounds occasionally, and stated that Claimant should avoid repetitive bending, stooping, lifting, pushing, pulling and climbing (TR 167, 169; EX B, at 23). Dr. Dodge approved all of the positions on Employer's labor market survey, although he only approved the jobs of warehouse worker and janitor conditionally, explaining that some positions in this category could fall outside Claimant's medical restrictions (TR 168). Regarding the positions as a pest control technician, Dr. Dodge also stated that Claimant could not climb into attics or under stairs repetitively, but could only do so on occasion (TR 181).

Dr. Levine's restrictions on Claimant were much less clear, as stated previously. He did not generally distinguish between what jobs Claimant was precluded from performing based on his knee injury versus his back injury, but instead said that both injuries precluded Claimant from performing the jobs (CX 18, at 201). He also altered Claimant's lifting restrictions between one deposition and the next (EX R, at 443; CX 18, at 199-201). Further, he assigned significantly greater restrictions on sitting, standing, and walking than Claimant, at both his deposition and the hearing, stated that he was capable of performing. Although he had the opportunity to review Claimant's testimony, Dr. Levine

could not recall doing so, and was unaware of Claimant's self-assessed restrictions (CX 18, at 202). However, he abandoned his restrictions when informed of Claimant's testimony. Dr. Levine did not approve any of the jobs on Ms. Gill's survey. The jobs of janitor, warehouse worker and courier are clearly beyond his imposed lifting restrictions. At his April 2001 deposition, he also restricted Claimant from performing the remaining jobs on Employer's labor market survey – including small products assembler, security guard, screen printer and pest control technician – based on Claimant's attorney's description of the job requirements (CX 18, at 199-201). However, he could not recall which labor market surveys he actually reviewed (CX 18, at 203).

As discussed previously, Dr. Dodge's opinion is entitled to more weight than Dr. Levine's in this matter, and I will accept Dr. Dodge's assessment of Claimant's physical abilities. Dr. Dodge approved all of the jobs on Ms. Gill's labor market survey, although he noted that some janitor and warehouse worker positions could require lifting beyond his imposed restrictions, and stated that Claimant could not perform the job of pest control technician if it required him to frequently climb and crawl around small spaces, such as attics.

In addition to Claimant's physical impairments, Claimant contends that his psychological impairment limits his ability to work. The parties do not dispute that Claimant has a psychological impairment resulting from his industrial injuries. To a large extent, Drs. Bayardo and Zink agreed on Claimant's psychological condition. The doctors disagreed on the extent of Claimant's paranoid and psychotic tendencies, with Dr. Bayardo imposing more work restrictions on Claimant because Claimant's paranoia interferes with his ability to concentrate and take instruction (TR 26-27). Dr. Bayardo did not definitively preclude Claimant from performing any of the jobs on Ms. Gill's labor market survey, but cautioned that he believed Claimant would encounter difficulty performing some of the jobs. However, Dr. Bayardo testified at his deposition and at the hearing that Claimant was unable to perform full-time work because of his psychological condition (TR 33; EX V, at 510-11).

Both Dr. Bayardo and Dr. Zink presented coherent, well-formulated and clearly expressed opinions in this matter. Both acknowledged the other's expertise and professional competence. However, I give more weight to Dr. Bayardo's opinion because, as Claimant's treating psychiatrist, he had significantly more opportunity to observe Claimant's evolving mental status than did Dr. Zink. Additionally, Dr. Zink's opinion was based in part on the administration of tests which both doctors recognized were only "best estimates" because they were normed for an American, English speaking population (CX 13, at 166; TR 22). I accept Dr. Bayardo's restrictions set for Claimant, which cautioned against employment as a security guard and screen printer and precluded Claimant from working full time. Dr. Bayardo's opinion was well-supported by his treatment records, which repeatedly reference Claimant's inability to concentrate in his classes, his defiant attitude toward his class, his frequent forgetfulness and his increasing mistrust and paranoid thinking (CX 4, at 82, 84, 90, 94, 104, 115). Employer presented no evidence of part-time work which may be unavailable to the claimant. Therefore, it has presented no evidence of work that falls within Dr. Bayardo's restrictions,

and has failed to present suitable alternative employment. Therefore, I find that Claimant is permanently totally disabled, and has been since June 19, 1999, when he reached maximum medical improvement for his psychological injury.

2. Section 8(f) Special Fund Relief

Employer additionally filed an application for limitation of liability under §8(f) with the District Director based both on Claimant's back and psychological injuries (EX I, at 262). The Director has not filed a brief controverting Employer's application. Section 8(f) of the Act may be invoked by an employer to limit its liability for compensation payments for permanent disability to 104 weeks if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of the work injury and the pre-existing permanent partial disability. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). A pre-existing condition qualifies as a permanent partial disability under §8(f) if the condition is "sufficiently serious so that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability." *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 425 (1990). The mere fact that an employee suffered a prior injury is, in and of itself, insufficient to establish a pre-existing permanent partial disability. Instead, "[t]here must exist, as a result of that injury, some serious, lasting physical problem." *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46 (9th Cir. 1991).

Employer asserts that Claimant had a pre-existing injury to his back based on his spondylolisthesis, which Dr. Dodge stated existed prior to the work-related injury (TR 163-64, 167). Dr. Dodge also testified that Claimant's pre-existing back condition increased his level of disability following his industrial injury (CX 176). Based on the doctor's testimony, Employer may be able to show two elements of the test for §8(f) relief: that Claimant had a pre-existing permanent partial disability and that the disability which existed after the work-related injury was a combination of the work injury and the pre-existing condition. However, it is unnecessary to examine whether Employer has established these two elements, because it clearly fails to establish the third element of the test – that the pre-existing disability was manifest to the employer. In fact, Employer makes no effort to demonstrate how it has satisfied this prong of the test beyond merely stating that the condition need not be serious and that it was in fact manifest to the employer. *See* Employer's *Post Trial Brief*, at 22.

There is simply no evidence that Employer had actual or constructive notice of Claimant's pre-existing permanent partial disability. While Employer has presented a handful of medical records which pre-exist Claimant's 1997 back injury (*see* EX O, at 340-41, 345-47, 351-52, 383-90), these medical records fail to indicate that the claimant had spondylolisthesis. Accordingly, the Employer's contention that it is entitled to relief under §8(f) because the Claimant had pre-existing spondylolisthesis fails because that condition was not manifest prior to the work-related injury which is the basis of this case.

Further, there is no evidence to substantiate that any pre-existing permanent partial disability due to a back condition was manifest to the Employer. Records for treatment of low back pain in 1996 reveal that Claimant was treated not for a spinal injury, but for lower quadrant internal pain (EX O, at 340, 388-89). The record does contain a report of a May 6, 1996 barium enema conducted in connection with this lower quadrant pain which "noted incidentally ... a bilateral spondylolysis at L5,"[7] but this incidental finding, which does not reappear in the record at any time, falls far short of a probative diagnosis. Further, in any event, this is not the same condition as spondylolisthesis, which Employer contends is the pre-existing permanent partial disability, and there is no evidence in the record to the effect that spondylolysis is related to spondylolisthesis. The record does show that the Claimant was treated for mild lumbar pain after lifting a heavy pipe at work in January 1997 (EX O, at 385). This pain did not persist, however, and there is no indication that this brief period of back pain would have caused a cautious employer to think twice about hiring the Claimant or retaining his services. Therefore, Employer has failed to show that Claimant's spondylolisthesis was manifest to it before the industrial accident or that he had any other pre-existing permanent partial disability attributable to a back condition.

Employer also claims it is entitled to §8(f) relief for Claimant's psychological injury (EX I, at 262). Employer appears to offer two bases for this claim. First, it asserted in its application for §8(f) relief that Claimant's July 11, 1997 physical injury was a pre-existing permanent impairment in regard to the psychological injury and combined with the psychological injury to increase Claimant's level of disability that he would have had from the psychological injury alone (EX I, at 262). But where a claimant develops a psychological injury as a sequella of a physical injury, the date of injury for the psychological injury for the purposes of §8(f) is the date of the physical injury. *Cf*. *Bunge Corp. v. Director, OWCP*, 951 F2d. 1109 (1991) (addressing whether the claimant's psychological impairment was manifest to the employer before the date of the *physical* injury). Accordingly, since the physical injury and the psychological injury occurred on the same date, the physical injury could not pre-exist the psychological injury, and thus was not manifest prior to the psychological injury.

Employer's second contention is that, because Claimant had psychological predispositions that pre-existed the date of his physical injuries, Employer is entitled to §8(f) relief. It is true that both Drs. Bayardo and Zink stated that Claimant had pre-existing personality traits that caused his psychological injury to be greater than it would have been had he not had those personality traits, and which predisposed him to developing a psychological injury as a result of his physical injuries (TR 35; EX W, at 520). However, there is absolutely no evidence in the record revealing previous indications of or treatment for depression or psychosis prior to July 11, 1997. Claimant was never treated for depression previous to his back injury in 1997. He never underwent psychological testing to indicate a personality disorder. His behavior previous to his industrial accidents gave no indication of depression,

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[7] Spondylolysis is the dissolution of a vertebra, *Dorland's Illustrated Medical Dictionary* 1563 (28th ed. 1994), which is different from spondylolisthesis. *See* n.5 *supra*.

paranoia or psychosis. Further, even if he had been treated for depression previous to his accident, this alone would not necessarily be sufficient to establish "a *serious*, *lasting* emotional problem" warranting § 8(f) relief. *Callnan v. Morale, Welfare & Recreation, Dep't. Of the Navy*, 32 BRBS 246, 250 (1998). Rather, all the evidence of record indicates that Claimant's psychological predispositions remained undetected until well after his physical injuries. Thus, Employer's application for §8(f) relief based on Claimant's psychological injury fails because Claimant had no serious, lasting problem constituting a pre-existing permanent partial disability, and because, even if he had such problem, the record gives no indication that it was manifest to Employer.

Employer bears the burden of establishing the elements of entitlement to §8(f) relief. In the present case, Employer has made little effort to articulate each element of entitlement. Further, the facts of the case fail to establish Employer's entitlement, and its application must therefore be rejected.

3. Concurrent Payment of Benefits

In his post-hearing brief, Claimant contends that he is entitled to payment under the schedule for partial disability as a result of his knee injury, to be paid concurrently with "any disability for the back." *Claimant's Post-Trial Brief*, at 17. Claimant asserts that concurrent payment is appropriate because "both injuries are separate and distinct as to date and body part." *Id.* However, on the next page of his brief, Claimant states that "[b]ecause Employer has failed to show suitable alternate employment Claimant is entitled to permanent total disability payments for the back (non-scheduled) once the payments for the left knee (scheduled) have been paid." *Id.*, at 18. Claimant appears to be asserting two different theories of entitlement to payment within his brief. Rather than attempting to parse out what Claimant is requesting, I will address what is in fact the appropriate method of compensation.

I have found that Claimant suffered a permanent partial disability under the schedule and is further entitled to total disability compensation based on his non-scheduled back and psychiatric injuries. The Board has long held that a Claimant who sustains a scheduled injury followed by an injury rendering him totally disabled is not entitled to recovery for both injuries, because "concurrent receipt of the two awards would give a claimant a double recovery and would not comport with the Act's compensation scheme ...." *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167, 172 (1981). Thus, because Claimant cannot be more than 100% disabled, I find that he is not entitled to compensation for his scheduled injury as long as he is receiving total disability compensation. Because Claimant has been totally disabled from one injury or another throughout the entire relevant time period, he will not receive an award under the schedule.

ORDER

IT IS ORDERED that:

1. Employer shall pay to Claimant:

a. compensation for temporary total disability from July 14, 1997 to July 15, 1997, based on his back injury, and from April 7, 1998 – the day following his knee injury – to January 13, 1999 – the day before his knee injury became permanent.

b. compensation for temporary total disability from January 14, 1999 to June 18, 1999.

c. compensation for permanent total disability beginning on June 19, 1999.

All payments of compensation shall be based on Claimant's average weekly wage of $558.59.

2. Employer shall pay all medical expenses resulting from Claimant's work-related back, knee, and psychiatric injuries.

3. Employer shall pay interest on all payments of compensation from the dates due until paid in accordance with 28 U.S.C.1961(a).

4. Credit shall be given for all previous payments of compensation and medical benefits.

5. Employer's application for §8(f) relief is denied.

A
JEFFREY TURECK
Administrative Law Judge